120-52

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1032.

THE UNITED STATES, APPELLANT,

vs.

HENRY R. PHILBRICK.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1032.

THE UNITED STATES, APPELLANT,

vs.

HENRY R. PHILBRICK.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed January 25, 1886	1	1
Traverse, filed February 17, 1886	3	2
Findings of fact and conclusion of law	4	2
Final judgment	7	3
Application for and allowance of appeal	8	4
Certificate	9	4

1 In the Court of Claims.—Filed January 25th, 1886.—J. R.

HENRY R. PHILBRICK
vs.
THE UNITED STATES. } No. 14762.

I.—*Petition.*

To the honorable the judges of the Court of Claims:

The petition of Henry R. Philbrick respectfully shows to your honors:

That he is a citizen of the United States and an officer of the Navy thereof, to wit a carpenter, and has served continuously as such since November 12th, 1869;

That under the naval appropriation act of August 5th, 1882 (22 Stats., 487), petitioner had a good and valid claim against the United States for longevity pay from November 12th, 1869, on account of prior service as carpenter from July 8th, 1861, to March 14th, 1866;

That a portion of said claim was allowed by the late Second Comptroller of the Treasury, Hon. W. W. Upton, and paid to your petitioner, but that the said Upton deducted from the amount justly due your petitioner on said claim the sum of $169.50 on account of the sums alleged to have been unlawfully paid him from November 12th, 1869, aforesaid, to June 30th, 1870, and allowed by former accounting officers of the Treasury for commutation of quarters, furniture, lights, and fuel, under section 4 of the act of Congress approved April 17th, 1866 (14 Stats., 38), as
2 construed by the Secretary of the Navy and said accounting officers; and that said Upton declined to allow the further sum of $45.38 which your petitioner says was justly due him on said claim under said act of 1882 and said act of 1866 as so construed;

That the present Second Comptroller of the Treasury, Hon. J. H. Maynard, having decided in the case of Louis R. Chester that such deductions were unlawful, your petitioner made claim before him for the amounts so deducted and disallowed as aforesaid, but that his said claim was rejected on the ground that the Comptroller could not reverse the action of his predecessor in petitioner's case; wherefore he brings this suit and prays judgment in the sum of $214.88.

Your petitioner says that he is the sole owner of this claim and has never disposed of the same, or any part thereof, to any person; that he is justly entitled to the amount thereof, after allowing all just credits and offsets; that he has at all times borne true allegiance to the Government of the United States, and has never voluntarily aided, abetted, or given encouragement to rebellion against said Government, and that he believes the facts stated in this petition to be true.

Your petitioner has appointed John Paul Jones, of Washington, D. C., his attorney for the prosecution of this claim.

H. R. PHILBRICK,
By JOHN PAUL JONES.

Subscribed and sworn to before me this 25th day of January, 1886.

JOSEPH W. AMAN,
Commissioner Court of Claims.

3 II.—*General traverse.*—*Filed Feb'y* 17, 1886.

And now comes the Attorney-General on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

4 III.—*Findings of fact and conclusions of law.*—*Filed May* 3, 1886.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant is a carpenter in the United States Navy, and has served as such since November 12, 1869.

He also served as a carpenter in the Navy prior to the date of his present warrant, to wit, from July 8, 1861, to March 14, 1866.

II.

On the 23d day of May, 1866, the Secretary of the Navy issued the following general order:

[General Order No. 75.]

NAVY DEPARTMENT, *May* 23, 1866.

Congress having, in view of the call for increased compensation to officers of the Navy, repealed the law which prohibited any allowance to them "for rent of quarters or to pay rent for furniture, or for lights or fuel, &c., &c.," the Department, in order to prevent a recurrence of the irregularities, abuses, and arbitrary allowances which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed. Accordingly, from and after the first day of June proximo, officers who are not provided with quarters on shore stations will be allowed a sum equal to thirty-three and one-third per centum of their pay in lieu
5 of all allowances, except for mileage or traveling expenses under orders, and those provided with such quarters, twenty per centum of their pay in lieu of said allowances.

The act of March 3, 1865, having increased the pay of midshipmen and mates, the allowance hereby authorized will not be extended to them.

GIDEON WELLES,
Secretary of the Navy.

III.

The claimant filed his claim for the benefits of the act of 3rd March, 1883, with the Fourth Auditor of the Treasury, and in due time it was passed by that officer and forwarded to the Second Comptroller, who is by law the reviewing officer charged with the settlement of this class of claims. The sum of $214.88 was deducted from that settlement by the Second Comptroller. This amount is made up of two items, viz: $169.50, alleged to have been overpaid claimant, in mistake of law, from November 12, 1869, to July 1, 1870, under the order of the Secretary of the Navy set forth in Finding II, and $45.88, which he would have received if all of his service in the Navy "had been continuous and in the lowest grade having graduated pay held by him since last entering the service" (i. e., carpenter) under the provisions of the act of 1883.

IV.

In the Register of the Navy of the United States to January 15, 1884, p. 86, under the heading "Warrant-Officers, Carpenters," is the following entry:

Active list: Henry R. Philbrick; present duty, station or residence, New London, Conn.; born Maine; appointed from Maine; resident of Maine; entry into service, 23 June, 1869; present appointment, 23 June, 1869; total sea service, nine years five months; shore duty, two years one month; unemployed three years; in service fourteen years six
6 months; expiration of last cruise, August, 1877.

V.

If claimant had been credited on his warrant as an officer of the regular Navy with his prior services as a volunteer, the sum of $25.46 would have accrued to him, after deducting internal-revenue tax, on account of the allowances authorized by the general order between November 12, 1869, and June 30, 1870, in addition to the sums deducted in the settlement of September 8, 1884 ($169.50).

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as conclusion of law:

The claimant is entitled to recover the money withheld by the accounting officers in the settlement of his account, to wit, the sum of $214.88.

7 IV.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 3rd day of May, A. D. 1886, judgment was ordered to be entered up as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said Henry R. Philbrick do have and recover of and from the United States, the sum of two hundred and fourteen $\frac{88}{100}$ dollars ($214.88).

8 V.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 3d day of May, 1886, in favor of claimant, the defendants, by their Attorney-General, on the 25th day of May, 1886, make application for and give notice of an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed May 25, 1886.

And now to wit, May 25, 1886, it is ordered by the court that the appeal be allowed as prayed for.

WILLIAM A. RICHARDSON,
Chief Justice.

9 In the Court of Claims.

VI.

HENRY R. PHILBRICK
vs.
THE UNITED STATES. } No. 14762.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, the judgment of the court, the application of the defendants for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 14th day of September, 1886.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1032. The United States, appellant, vs. Henry R. Philbrick. Court of Claims. Filed September 27, 1886

120-52

Office Supreme Court U. S.
FILED.
DEC 4 1886
JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANT,
vs.
HENRY R. PHILBRICK.
} No. 1032.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANT,
vs.
HENRY R. PHILBRICK. } No. 1032.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This is an appeal from a judgment rendered by the Court of Claims in favor of Henry R. Philbrick against the United States on the 3d day of May, 1886, for the sum of $214.88.

Claimant in the court below is a carpenter in the United States Navy and has served as such since November 12, 1869. He is credited with previous service in the Navy as a carpenter from July 8, 1861, to March 14, 1866.

The claimant demanded and received the benefits of the *Act of March* 3, 1883 (22 Stat L., 473), relating to longevity pay. But in the settlement the sum of $214.88 was deducted by the Second Comptroller.

This amount is made up of two items, viz:

For amount alleged to have been overpaid claimant in mistake of law, from November 12, 1869, to July 1, 1870, under and by virtue of General Order, No. 75, of the Secretary of the Navy.....	$169 50
And amount which he would have received if all of his service in the Navy had been continuous, and in the lowest grade having graduated pay held by him since last entering the service (*i. e.*, carpenter) under the provisions of the act of 1883	45 88
	214 38

[General Order, No. 75.]

NAVY DEPARTMENT, *May* 23, 1866.

Congress having, in view of the call for increased compensation to officers of the Navy, repealed the law which prohibited any allowance to them "for rent of quarters or to pay rent for furniture, or for lights and fuel, &c.," the Department, in order to prevent a recurrence of the irregularities, abuses, and arbitrary allowances which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed. Accordingly, from and after the 1st day of June proximo, officers who are not provided with quarters on shore stations will be allowed a sum equal to thirty-three and one-third per centum of their pay in lieu of all allowances, except for mileage or travelling expenses under orders; and those provided with such quarters, twenty per centum of their pay in lieu of said allowances.

The act of March 3, 1865, having increased the pay of midshipmen and mates, the allowance hereby authorized will not be extended to them.

GIDEON WELLES,
Secretary of the Navy.

If claimant is credited with his prior services as a volunteer and the internal-revenue tax is deducted together with the said sum of $169.50 be disallowed, the sum of $25.46 will still be due him. The question in this case is as to the legality of General Order, No. 75, *supra*, is sued by the Secretary of the Navy May 23, 1866.

Statutes applicable.

Section 2 of the *Act of April*, 1814 (3 Stat L., 136):

> That the President be, and is hereby, authorized to make an addition not exceeding 25 per cent. to the pay of the officers, midshipmen, seamen, and mariners engaged in any service, the hardships or disadvantages of which shall, in his judgment, render such addition necessary.

Act of February 22, 1817 (3 Stat. L., 345), provides as follows:

> That the second section of an act entitled "An act concerning the pay of officers, seamen, and marines in the Navy of the United States," passed the 18th of April, 1814, be, and the same is hereby, repealed.

Second section of *Act of March* 3, 1835, entitled "An act to regulate the Navy of the United States" (4 Stat. L., 457):

> Nor shall any allowance be made to him (any officer) for rent of quarters, or to pay him for any furniture, or for lights or fuel, or for transportation of baggage.

Extract from *Act of April* 17, 1866 (14 Stat. L., 38):

> That so much of the second section of an act entitled "An act to regulate the Navy of the United States," approved March 3, 1835, as prohibits any allowance to any officer in the naval service for rent of quarters or of furniture, or for lights or fuel, or transporting baggage, and all acts and parts of acts authorizing the appointment of Navy agents be, and the same are hereby, repealed.

Section 3662, Revised Statutes:

> All estimates for the compensation of officers, authorized by law to be employed, shall be founded on the express provisions of law, and not upon the authority of executive distribution.

It is claimed on the part of the appellant that General Order, No. 75, *supra*, dated May 23, 1866, was issued without authority of law, and is without binding force or effect.

No opinion was delivered by the court below.

ASSIGNMENT OF ERRORS.

The court below erred—

(1) In deciding, as a conclusion of law based on the facts as found, that "the claimant is entitled to recover the money withheld by the accounting officers in the settlement of his account, to wit, the sum of $214.88."

In ordering, adjudging, and decreeing "that the said Henry P. Philbrick do have and recover of and from the United States the sum of two hundred and fourteen $\frac{88}{100}$ dollars ($214.88)."

BRIEF OF ARGUMENT.

The *Act of April* 17, 1866 (14 Stat. L., 38) did not invest the Secretary of the Navy with additional power to make orders, regulations, and instructions. It repealed acts authorizing the appointment of Navy agents, and also the second section of "An act to regulate the Navy of the United States" approved March 3, 1835. That act prohibited any allowance to officers for rent of quarters, or of furniture, or for lights or fuel, or the transportation of baggage (4 Stat. L., 757). The act of 1835 was prohibitory.

Discretionary power to make an addition not exceeding 25 per cent. to the pay of naval and marine officers and seamen, when in his judgment the hardships and disadvantages should render such addition necessary, was conferred upon the President by section 2 of *Act of April,* 1814 (3 Stat. L., 136).

The discretion so vested was repealed by *Act of February* 22, 1817 (3 Stat. L., 345).

Allowances were made officers by the Secretary of the Navy between 1824 and 1835 under and by virtue of special appropriations, but such special appropriations related solely to the years for which made and did not have the force and effect of any general extension of the powers of the Secretary of the Navy. It was by reason, however, of supposed irregularities, abuses, and arbitrary allowances, referred to in General Order 75, made under and by virtue of such special appropriations that the prohibitory law of 1835, *supra,* was enacted.

It is evident, however, that whatever irregularities or

partialities may have existed prior to 1835 in the allowances made naval officers and seamen, such allowances were made under and by virtue of lawful appropriation.

There is marked difference in the conditions under which General Order No. 75 was issued. That order is in effect that the pay of officers who are not provided with quarters on shore stations shall be advanced 33⅓ per cent., and those who are provided with such quarters be advanced 20 per cent.

Such order is not based upon any appropriation, nor is it specially authorized by any law.

It was not made in conformity with law—it was made in violation of law.

The pay of naval officers is fixed by statute. The Secretary of the Navy has no power to increase or diminish it. The powers of all officers from the President down are limited by law. (*The Floyd Acceptances*, (7 Wall., 677; *United States* vs. *Alexander*, 110 U. S., 329; *Moffat* vs. *United States*, 112 U. S., 32.)

The extra compensation allowed by such order cannot be legally included in the estimates for appropriation.

Section 3662, Revised Statutes, provides:

> All estimates for the compensation of officers, authorized by law to be employed, shall be founded on the express provisions of law, and not upon the authority of executive distribution.

The power of heads of Departments to make regulations is limited (Rev. Stat., § 161) to "the government of the Department, the conduct of the officers and clerks, the distribution and performance of its business, the presentation, use, and custody of its records, papers, and property appertaining to it."

Section 1547, Revised Statutes, provides:

> That the orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

Such regulations have the force and effect of law when made in conformity with existing law. (*Gratiot* vs. *United States*, 4 Howard, 80, and *Ex parte Reed*, 100 U. S., 13.)

As the pay of naval officers is fixed by statute, without any authority vested in the Secretary of the Navy to increase or diminish the pay so fixed by a direct order, he cannot lawfully, as attempted in General Order, No. 75, accomplish the result by any indirect order. The pay of an officer, it is true, varies, dependent upon the fact as to whether he is assigned to sea-service or shore duty, and it may often happen that owing to peculiarities of the assigned duty, an increase of pay would seem proper. But the amount of pay attaching to the duty is a matter not in the control of the Secretary of the Navy. It is not within the scope of his authority. Where extraordinary and unusual expense is incurred in the execution of orders properly issued, such actual expense will, if justified by the nature of the case, be refunded. This is a recognized authority. But this in no degree justifies an order increasing the pay of officers assigned to shore duty one-third in all cases where quarters are not provided, whatever may be the actual cost of such quarters, and certainly does not authorize him to increase the pay of such officers one-fifth where quarters are provided.

It is respectfully submitted that General Order, No. 75, is not in conformity with law; that the sum of $169.50 paid in pursuance of such order was unlawful; that such sum was properly chargeable against claimant's credit for longevity pay under the provisions of the act of 1883, and that the decree of the court below should be reversed.

A. H. GARLAND,
Attorney-General.

F. P. DEWEES,
Assistant Attorney.

120-52

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES,
Appellant,
vs.
HENRY R. PHILBRICK,
No. 1,032.

STATEMENT AND BRIEF OF APPELLEES.

JOHN PAUL JONES,
ROBERT B. LINES,
Counsel.

MILANS, PR.

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES,
vs.
HENRY R. PHILBRICK. } No. 1,032.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S STATEMENT.

The appellee in this case is a carpenter in the Navy, who served as such in the Volunteer Navy, from July 1861, to March 1866, and entered the regular service in Nov. 1869. By what are known as the longevity pay provisions in the Naval appropriation acts of August 5, 1882, and March 3, 1883, he was directed to be credited on his second warrant, with the time served under his first, as though his service had been continuous and in the regular Navy.

A settlement of his accounts from November, 1869, was accordingly made by crediting him with his former service. But in making such settlement second Comptroller Upton discovered that between May 23, 1886, and July 1, 1870, officers of the Navy had received what was known as "one third additional pay," under supposed authority of an act of April 17, 1866, as interpreted by the then Secretary of the Navy and accounting officers of the Treasury. This allowance Comptroller Upton decided to have been illegal, and he therefore deducted the sums paid appellee on account thereof, between November 1869, and July 1870, from the amount of his claim under the Acts of 1882 and 1883.

Suit was brought below to recover the amount so deducted and judgment rendered in favor of appellee for $214.88, but no opinion was delivered by the court.

Brief of Argument.

The settlement by the accounting officers of the Treasury in favor of appellee was made under the provisions of the Acts of August 5th, 1882, and March 3d, 1883, as construed by the Court of Claims in the cases of Hawkins and Jordan (19 Ct. Cls., 611–621.) Those cases established the proposition that the acts in question were retroactive in effect and carried back pay with them. The soundness of these decisions has never been questioned by the Treasury or Navy Departments, and the Hon. Attorney General does not dispute it in this case. We will, therefore, consider the Hawkins and Jordan cases (as we did in our brief in Rockwell's case, No. 1,030, this term) as furnishing a true exposition of the meaning of the acts in question, begging permission however, to be heard upon them, if the court is in doubt.

Appellee filed his claim for the benefits of these acts with the Hon. Fourth Auditor of the Treasury, and in due time it was passed by that officer, and forwarded to the Hon. Second Comptroller, who is by law the reviewing officer, charged with the settlement of this class of claims. The sum of $214.88, was deducted from that settlement by the Second Comptroller. This amount is made up of two items, viz: $169.50, which it is alleged was overpaid claimant, in mistake of law, from November 12, 1869, to July 1, 1870, and $45.88, which he would have received as longevity increase upon this said sum of $169.50, if all of his service in the Navy "had been continuous and in the lowest grade, having graduated pay held by him since last entering the service," (*i. e.* carpenter,) under the provisions of the Acts of 1882 and 1883.

At the time this deduction was made Hon. W. W. Upton was the Second Comptroller. He was succeeded by the present incumbent, on June 2, 1885, and when the question of making a similar deduction in the case of Ensign Louis R. Chester was presented to him, after a thorough examination, he decided that such deduction was illegal, and gave to Chester, what we are now compelled to sue for, in the case of Philbrick, (see Comptroller's opinion, Appendix.)

After the Comptroller's decision in the Chester case, application was made to have the settlement in Philbrick's case reopened, and the amount now sued for allowed, but the application was denied upon the ground that the account had been closed by a previous Comptroller, and could not be reopened by the present incumbent. In other words, the claim was just and valid and the money honestly due, but there was no remedy in the Treasury, although the officials were, and still are, in full accord with our theory of the law.

The Act of March 3, 1835, (4 Stats. L., 757,) contains the following:

"* * * Nor shall any allowance be made to him (any officer) for rent of quarters, or to pay rent for furniture, or for lights or fuel, or transportation of baggage."

The 4th Section of the Act of April 17, 1866, (12 Stats., 38,) is as follows:

"That so much of the Second Section of an act, entitled an Act to regulate the pay of the Navy of the United States, approved March 3, 1835, as prohibits any allowance to any officer in the Naval service, for rent of quarters, or for furniture, or for lights or fuel, or transporting baggage, and all acts and parts of acts, authorizing the appointment of Navy Agents be, and the same are, hereby repealed."

Under supposed authority of this last Act, which

repealed the prohibition of the allowance of commutation for quarters, fuel, light, &c , the Secretary of the Navy issued the following general order:

GENERAL ORDER, No. 75. NAVY DEPARTMENT, May 23, 1866.

Congress having, in view of the call for increased compensation to officers of the Navy, repealed the law which prohibited any allowance to them "for rent of quarters or to pay rent for furniture, or for lights or fuel, &c., &c.," the Department, in order to prevent a recurrence of the irregularities, abuses, and arbitrary allowances which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed. Accordingly, from and after the first day of June proximo, officers who are not provided with quarters on shore stations will be allowed a sum equal to thirty-three and one-third per centum of their pay in lieu of all allowances, except for mileage or travelling expenses under orders; and those provided with such quarters, twenty per centum of their pay in lieu of said allowances.

The Act of March 3, 1865, having increased the pay of midshipmen and mates, the allowance hereby authorized will not be extended to them.

GIDEON WELLES,
Secretary of the Navy.

This act was evidently intended to provide for some additional allowance to officers of the Navy, and this order was issued to carry that intention into effect.

The only question, therefore, is, whether this Act authorized allowances in gross for the expenses of fuel, lights, &c., or only permitted the accounting officers of the Treasury to settle accounts for these items according to actual expenditures.

If the laws or the practice in force before the passage ef the Act of 1835, permitted only the settlement of accounts for actual expenditures, it would seem reasonable to hold that the Act of 1866 was intended merely

to restore such practice. If, on the other hand, the practice before 1835 had been to make a gross allowance on account of, or by way of commutation for fuel, lights, &c., the conclusion would seem irresistible that the Act of 1866 was intended to restore the latter practice.

By Section 2, of the Act of April 18, 1814, (3 Stats. L., 136,) the President was authorized to make an allowance not exceeding *twenty-five per centum* additional to the pay of officers of the Navy engaged in any service, the hardships or disadvantages of which should, in his judg ment, render such addition necessary. This Act was repealed by the Act of February 22d, 1817, (3 Stats., 345,) and for some time thereafter it does not appear that any allowances were made.

From 1824 to 1835, however, the Naval appropriation bills contained special appropriations for fuel, lights, rent of quarters, &c., and down to 1829 these appropriations were made separately for officers on shore stations and those not on shore. The apportionment of these appropriations was left to executive authority *ex necessitate rei*.

House Ex. Doc. 192, 23d Congress, 2d Session, contains a report from the Fourth Auditor of the Treasury, under date of February 5, 1835, showing how the moneys appropriated by these various appropriation Acts were apportioned among the officers of the Navy. By reference to this report it will be seen that in every case where allowances were made for these expenditures they were (like the allowances for rations then and still existing) in the shape of a fixed sum *per annum*, and by way of commutation. It will also be observed that in many cases the amount of these additional allowances was considerably more than one-third of the pay proper of the officer. Thus warrant officers at the Washington Navy Yard were paid $240

per annum, with two rations for themselves aggregating $182.60, $90 for house rent, $12 for candles, $40.50 for fuel, $72 for servants, and $91.25 for servants' rations, making their pay and allowances $728.25.

These were the sort of allowances prohibited by the Act of 1835, and partially restored by the Act of 1866. They were allowances in gross, and not merely the reimbursement of actual expenses. It is, of course, immaterial that when restored they took the shape of a percentage on the salary of each officer instead of a fixed sum in lieu of each item of expenditure, (which, as was said in the order restoring them, had operated unequally). Allowances may be either by way of reimbursement or by way of compensation, (Sherborne's Case, 16 C. C., p. 491; Emory's Case, 19 C. C., p. 267,) and if by way of compensation they may be founded on any basis which the authority making them sees fit to adopt.

It was permitted by the Act of 1866, that some one might establish allowances in the same manner as it could be done before the Act of 1835. The law was silent as to whether the discretion was vested in the Secretary of the Navy or the accounting officers of the Treasury, but, as the head of the Navy of the United States, the Secretary would seem to be the person in whom the power rested. Any regulation issued by him, within the scope of his authority, had the force and effect of law, (Gratiot *v.* U. S., 4 How., 80; *ex parte*, Reed 10 Otto, 20,) and the Act of 1866, was ample authority for him to act in the premises. This is, however, immaterial, as the accounting officers affirmed these allowances, and paid them to every officer then in the Navy. It is worthy of remark also, that Congress ratified the order by appropriating to meet the necessary disbursements under it for four years, from 1866 to 1870.

The legality of the Secretary's order was discussed at length on the floor of the House of Representatives when the Naval Appropriation Act of 1870 was under discussion, and we find that Messrs. Kelley and O'Neill, then, as now, members from Pennsylvania, one of whom was a member of the committee having the matter in charge, stated that the effect of the Act of 1866 was understood at the time of its passage. (Cong. Globe, 2d Sess., 41st Cong., pp. 2882 and 3553.)

The power of the Secretary to issue such an order was ably defended by Messrs. Archer (p. 3544), Sargent, and Hale (afterwards Senators), (p. 3549), and Mr. Scofield, now a member of the Honorable Court of Claims.

If Congress had considered the action of the Secretary illegal, then was the proper time to so declare. Instead of this, however, the present pay table (Sec. 1556, R. S.) was passed, largely increasing, in most cases, the compensation which officers had received under the Secretary's order.

II.

Admitting, however, by way of argument, that the Secretary's legal authority to issue General Order No. 75, was doubtful, and waiving its implied ratification by Congress, this case would fall within the principle so often announced by this court, in regard to contemporaneous Executive Construction, and this construction should not be overruled, without the most cogent reasons.

U. S. *vs.* Moore, 95 U. S., 760, 763.
Brown *vs.* U. S., 113 U. S., 571.
Edwards *vs.* Darby, 12 Wheat., 206.
Atkins *vs.* Disintegrating Co., 18 Wall., 272.
Smith *vs.* Fiske, 23 Wall., 374.
U. S. *vs.* Pugh, 99 U. S., 265.

The sole aim of the Acts of 1882 and 1883, as con-

strued by the lower court, was to give to naval officers *benefits of pay*. It can readily be seen that in some cases, the longevity increase, growing out of prior service, would be less in amount than the former allowance under the order of 1866. The prior service of an officer thus affected, would be a disadvantage to him, instead of a benefit, because, should the judgment of the lower court be reversed, the accounting officers would be compelled to check the difference between these amounts against his future pay.

Not only would this be true in the case of an officer making a claim for additional pay under the Acts of 1882 and 1883, but every officer who was in the service from 1866 to 1870, whether claiming under these later acts or not, must now have the amounts received as additional pay checked against him, and thus be deprived of all pay for over a year to come.

It is doubtless in view of this necessary consequence, following a reversal of the judgment below, that the Honorable Attorney General says in his brief, "This is a test case," because the Records of the Court of Claims, and the Treasury Department, to which he has access show that there are but thirteen officers having claims under the Acts of 1882 and 1883, against whom such deduction could be made, and the aggregate amount would be too insignificant to allow the presumption, that the Attorney General would ask this Court to overrule the Court of Claims, and the present Honorable Second Comptroller, if these cases alone were involved.

It is respectfully submitted that the judgment of the lower Court is correct, and should be affirmed.

ROBERT. B. LINES,
JOHN PAUL JONES,
Counsel for Appellee.

APPENDIX.

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
Oct. 19th, 1885,

In the matter of the claim of Louis R. Chester for longevity pay.

Opinion.

Claimant was appointed a master in the Navy, on the retired list, by Act of Congress approved February 21, 1873. He had previously served as enlisted man and acting ensign eleven years and two hundred and thirty-nine days. He accepted his appointment as a master March 14, 1873, and received duty pay at the rate of $1,500 per annum from March 14 to March 31, 1873, since which time he has been paid $1,350 or 75 per cent. of $1,800 annually.

He now claims that under the act approved March 3, 1883, he was entitled to be paid as in his second five years at the rate of $1,500 per annum, or 75 per cent. of $2,000 from April 1, 1873, to January 30, 1885, inclusive.

Under construction given to the Act of 1883 by the Court of Claims in the case of Bradbury *v.* The United States, the claimant must have credit for his services prior to his appointment as a master with the same force and effect as if all of such services had been continuous and in the regular Navy, and in the grade of master, and the Auditor has given him such credit, but has charged him with the sum of $807.62, being the amount of one-third additional pay which he received from June 1, 1866, to December 10, 1868, under general order issued by the Secretary of the Navy May 23, 1866, which provided that from and after the first day of

June proximo, officers who were not provided with quarters on shore stations, should be allowed a sum equal to thirty-three and one-third per centum of their pay in lieu of all allowances except for mileage or travelling expenses under orders, and those provided with such quarters should be allowed twenty per centum of their pay in lieu of said allowance.

It is claimed that this order was illegal and unauthorized, and that, therefore, the claimant is liable to be charged with the moneys received in his accounts with the Government whenever the same are presented to the accounting officers for settlement.

The validity of this order of the Secretary of the Navy is certainly open to serious question, but the presumption is in favor of its regularity and legality, and having been duly promulgated and executed by the Department which issued it, it should be respected and treated as an exercise of lawful authority when collaterally questioned in a co-ordinate Executive Department, unless it is clearly made to appear that it was issued without jurisdiction, or in violation of law.

The subject of the power of the Secretary of the Navy prior to the passage of the Act of March 3, 1835 (4 Stats., 757), to make allowances of a sum in gross for rent of quarters, furniture, lights, fuel, &c., is involved in great obscurity. The power was originally conferred upon the President by Act of April 18, 1814 (3d Stats., 136), to make such allowances, not to exceed 25 per cent. additional to the pay of the officers of the Navy engaged in any service, the hardships or disadvantages of which should, in his judgment, render such additional compensation necessary.

This act was repealed February 22, 1817 (3d Stats., 345), and from that time until 1824 no such allowances were granted, but from 1824 to 1835, the naval appro-

priation bills contained items in gross for fuel, light, rent of quarters, &c., which were apportioned by the Secretary of the Navy among the officers in such a manner as, in his judgment, might seem just and proper.

The Act of 1835 readjusted and generally increased the salaries and pay of naval officers, and doubtless, in consideration of such increase, Section 2 provided that no allowance should thereafter be made to any officer for rent of quarters, furniture, lights, fuel, or transporting baggage, which provision continued in force until the passage of the Act of April 17, 1866 (14th Stats., 38), Section 4 of which provided that so much of Section 2 of the Act of 1835, as prohibited any allowance to any officer in the naval service for rent of quarters, or for furniture, or for lights, or fuel, or transporting baggage, should be repealed.

This repeal was construed by the Secretary of the Navy as *ipso facto*, reinvesting him with the power of making allowances of this character, according to the practice which had prevailed before the enactment of the prohibition in the law of 1835, and thereupon he issued the order above referred to, in which he recites that Congress having, in view of the call for increased compensation to officers of the Navy, repealed the law which prohibited any allowance to them for rent of quarters or to pay rent for furniture, or for lights, or fuel, &c., the Department, in order to prevent a recurrence of the irregularities, abuses, and arbitrary allowance which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed, and it was, therefore, provided that all naval officers should receive the sum specified in the order in lieu of all allowances, except for mileage or tavelling expenses under orders.

Pursuant to this order claimant was paid the allowances which he was entitled to thereunder by the proper disbursing officers of the Navy, and the accounts of such officers, containing these payments charged against the Government, were duly presented to the proper accounting officers and approved of and allowed by them.

After the lapse of seventeen years it is now sought to extinguish *pro tanto* the liability of the Government to such officers, under the Act of 1883, by charging them with the amount of such payments.

Unquestionably, if public funds are paid to an officer under a mistake of fact or in the face of some statutory prohibition, it may be charged against him in any subsequent settlement of his accounts with the Government, yet I do not think the rule has any application to a case where the payment has been made under a claim and color of right, and has been approved and ratified by the agents of the Government, and acquiesced in for a long period of time. But, without undertaking to formulate any new rule upon this subject, I think the true construction to be given to the course of Congressional legislation in regard to these allowances requires the action of the Secretary of the Navy to be upheld.

The act of 1835, by necessary implication, recognized the existence of the power in the Secretary of the Navy to make allowances of this character, for it prohibited the making of such allowances, and a prohibition was unnecessary and meaningless if the power did not previously exist.

Such being the case, the repeal of the act of 1835, revived and continued in force the laws and regulations which had therefore prevailed, and reinvested the Secretary of the Navy with the authority, which

he had previously possessed, to regulate and apportion these allowances.

It is well settled that the repeal of a repealing statute revives the laws which had been repealed by the latter (*Vandenberg* v. *Village of Greenbush*, 66 N. Y., 1). But if the authority of the Secretary of the Navy was doubtful in the premises, I am of the opinion that, under the circumstances shown to exist in this class of cases, Congress must be deemed to have ratified and confirmed the order of May 23, 1866, and the proceedings of the Navy Department thereunder.

The Secretary of the Navy, representing the President, may make such orders and regulations, not inconsistent with existing laws, as he may deem proper for the administration of the affairs of the Naval Department (sec. 1647, Revised Statutes).

Under this authority, he assumed to make the order in question, and out of the annual appropriations made by Congress for the pay of the Navy, he caused the allowances therein granted to be paid. The heads of the proper Departments annually reported such payments to Congress, with the other expenditures of the Government, and the amount necessary to liquidate them was annually included in the estimates of the Secretary of the Navy of the expenses of his Department for the ensuing fiscal year and transmitted to Congress, which estimates formed the basis of their appropriation.

The existence of this order and the disbursements made thereunder cannot have escaped the attention of Congress, and the annual appropriation by them of the monies required to make it effectual must be deemed a ratification of it by them, even if originally issued without sufficient authority. (*The people* v. *Stephens*, 71st N. Y., 527; 72d N. Y., 621.) It seems to have been the practice of the accounting officers, here-

tofore, to regard this order of the Secretary of the Navy as unauthorized and void, and the officers receiving the allowances granted by it liable to be charged with the amount so received in the adjustment of claims for longevity pay, under the act of 1883, whenever the longevity period overreached the period or any portion of it during which payments were made under the order, but in no other case have the officers receiving these allowances been charged therewith.

It is difficult to perceive upon what tenable grounds such a distinction can be upheld. If any officer receiving the benefits of the order is required to account for the moneys received under it the same rule should be applied to all officers who have been the recipients of such benefits and who are now in the service; but as the action of the Secretary of the Navy can be sustained upon the grounds above stated it seems to me that justice requires that, at this late day, the payments made under it and approved by the accounting officers at the time they were made should not be disturbed.

The claimant is entitled to the full amount of longevity pay allowed by the Auditor, without deduction, and the certificate will be made out accordingly.

I. H. MAYNARD,
Comptroller.